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No. 06-144

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

PLAC is a non-profit corporation with 127 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Bates* v. *Dow AgroSciences, Inc.*, 544 U.S. 431 (2005); *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed *amicus* briefs in this case in the Minnesota Court of Appeals, the Minnesota Supreme Court, and this Court (when the case was last here on petition for a writ of certiorari). See *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005) (order) (granting PLAC's motion for leave to file *amicus* brief, granting the petition, vacating the judgment below, and remanding for reconsideration in light of *Bates*). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the

development of the law of preemption and the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

1. The Supremacy Clause of the Constitution provides that "the Laws of the United States * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State and local laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause" – that is, without regard to whether the federal statute, regulation, or treaty in question contains a provision specifying the extent of preemption. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984).

2. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, vests the Environmental Protection Agency ("EPA") with broad authority to regulate the labeling and packaging of pesticides sold in the United States. EPA has exercised that authority by, among other things, promulgating detailed specifications for pesticide labeling. See, *e.g.*, 40 C.F.R. § 156.10.

In enacting FIFRA, Congress took steps beyond merely relying on the Supremacy Clause and long-settled principles of "implied" preemption to protect the EPA's authority to regulate pesticide labeling and packaging.[2] To that end, FIFRA contains

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[1] Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] "Implied" preemption covers situations where there is no explicit

a preemption clause – aptly titled "uniformity" – expressly barring states from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are "in addition to or different from those required under" federal law. 7 U.S.C. § 136v(b) (emphasis added). This provision extends the natural and automatic effect of the Supremacy Clause because it nullifies state labeling and packaging requirements that are "different from" or "in addition to" (even if not in conflict with) federal requirements for labeling or packaging.

In contrast, FIFRA expressly confirms the states's role in regulating the "sale or use" of pesticides (although states may not "permit any sale or use" that is "prohibited by" federal law). 7 U.S.C. § 136v(a). Under FIFRA, a pesticide (including a herbicide) may not be distributed or used in the United States unless first registered by EPA. *Id.* § 136a(a). But the states may (and all do) require separate registration (*i.e.*, approval) of pesticides for particular uses, and any state may refuse to permit the sale or use of an EPA-registered pesticide within its borders. *Id.* § 136v(a); Pet. 3, 5 n.1; *Amicus* Brief of CropLife America ("CLA *Amicus* Br."), at 12-13.

3. In the decision below, the Minnesota Supreme Court upheld a $52 million treble-damages judgment against petitioner BASF Corporation, a manufacturer of pesticides, in a nationwide class action brought under the New Jersey Consumer Fraud Act ("NJCFA"), N.J. STAT. ANN. §§ 56:8-1 to 56:8-116

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preemptive command by Congress ("express" preemption). Implied preemption falls into several categories. Implied *field* preemption occurs where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied *conflict* preemption, in contrast, involves conflicts between state and federal law. Such conflicts can take a number of forms, ranging from situations where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), to cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

(West 2002). Respondents are a class of all persons in the United States who purchased Poast, a herbicide made by BASF, between January 1, 1992, and December 31, 1996, for use on their crops (with the exception of certain North Dakota residents). Pet. ii. During the class period, Poast was more expensive than Poast Plus, another herbicide manufactured by BASF. The price differential between Poast and Poast Plus was the basis for respondents' consumer-fraud claims.

Over objection, a Minnesota jury was permitted to rely on two of BASF's labeling decisions concerning Poast in concluding that the company had committed an "unconscionable commercial practice" in violation of N.J. STAT. ANN. § 56:8-2 (West 2002). First, respondents claimed that it was "unconscionable" to put different names and labels on Poast and Poast Plus because the two herbicides have the same active ingredient. See Pet. 6-7, 16-17. Yet federal regulations *require* distinct product labeling for pesticides with the same active ingredients if their chemical formulae differ as much as Poast and Poast Plus do. See 40 C.F.R. §§ 152.15, 152.43, 158.175; Pet. 4, 22. Second, respondents claimed it was "unconscionable" to label and market Poast Plus, which was less expensive than Poast, for only a subset of its EPA-approved uses. See Pet. 7-8, 16, 18-19. Yet federal regulations *expressly authorize* pesticide manufacturers to engage in this practice (known as "subset labeling"). See 40 C.F.R. § 152.130(b); 53 Fed. Reg. 15952, 15957 (May 4, 1988); Pet. 3, 16.

4. The Minnesota Supreme Court has issued two opinions in this case. Pet. App. 1a-24a, 55a-81a. In its 2004 decision, the court rejected BASF's argument that respondents' NJCFA claims are both expressly and impliedly preempted by federal law. See *id.* at 70a-75a.

5. In April 2005, this Court issued its decision in *Bates* v. *Dow AgroSciences, Inc.*, 544 U.S. 431 (2005). *Bates* interpreted 7 U.S.C. § 136v(b) and thus clarified the scope of *express* preemption under FIFRA. It did not, however, decide any issue of *implied* preemption. The only mention of implied preemp-

tion was a passing reference to *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which rejected implied "field" preemption because FIFRA was not "sufficiently comprehensive" to give rise to the inference that Congress had "occupied" the entire "field" of "regulation of pesticide use" by municipal governments. See *Bates*, 544 U.S. at 441-42; *Mortier*, 501 U.S. at 606-07.

In his separate opinion concurring in part in the judgment and dissenting in part, Justice Thomas, joined by Justice Scalia, stated: "Because we need only determine the ordinary meaning of § 136v(b), the majority rightly declines to address [Dow]'s argument that petitioners' claims are subject to other types of pre-emption." *Bates*, 544 U.S. at 458. "Today's decision," Justice Thomas wrote, "thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption." *Id.* at 459.

6. This Court subsequently granted BASF's petition for certiorari, vacated the decision of the Minnesota Supreme Court, and remanded for reconsideration in light of *Bates*. See *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005) (order).

7. On remand, the Minnesota Supreme Court again rejected BASF's preemption arguments. Pet. App. 1a-24a. As an initial matter, the court held that, under *Bates*, "state regulation must be *very directly related* to labeling and packaging in order to invoke FIFRA preemption." *Id.* at 13a (emphasis added). Next, the court indicated that this standard favored the respondents, because their claims were "not based on the content of the product labels, but rather on * * * nonlabel actions of BASF." *Id.* at 15a. The Minnesota Supreme Court took the view that express preemption turned on which side "more accurately characterize[s] the nature of the [respondents'] claims." *Id.* at 16a; see also *id.* at 18a ("[T]he fundamental debate is simply about how the farmers' claims are accurately characterized.").

Although *Bates* did not address *implied* preemption, the Minnesota Supreme Court nevertheless applied *Bates*'s test for express preemption to reject BASF's implied conflict preemp-

tion arguments. Affirming imposition of a $52 million punishment on the company in part for doing what federal law required, the Minnesota Supreme Court explained:

> [I]t appears to us that [BASF's] arguments that the farmers' claims would require BASF to label Poast and Poast Plus as one product and to market it in all states for all crops are in reality "effects-based" arguments. That is, the success of the farmers' claims might induce such conduct on the part of BASF. But, as explained above, the Supreme Court soundly rejected the effects-based inducement test for FIFRA preemption in *Bates*.

Pet. App. 18a n.14. Thus, the Minnesota Supreme Court treated this Court's rejection in *Bates* of the "inducement" test – which was part of this Court's interpretation of the phrase "requirements for labeling or packaging" (7 U.S.C. § 136v(b)) in FIFRA's express preemption clause – as restricting implied conflict preemption under the Supremacy Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Minnesota Supreme Court upheld a massive $52 million treble-damages judgment against petitioner BASF for marketing a pesticide with labeling that was entirely in compliance with requirements imposed under federal law. In concluding that BASF's marketing activities were fraudulent and "unconscionable" under the New Jersey Consumer Fraud Act, the jury relied on BASF's correctly having "lead farmers to believe" that Poast Plus "could only be used" on the major crops listed on its label – and, in fact, was a different product from Poast, another pesticide manufactured by BASF that at the time was less expensive. Pet. App. 16a. Yet federal law *required* BASF to give different names to Poast Plus and Poast, and it explicitly *authorized* BASF to include only a subset of the federally registered uses of Poast Plus on the product labeling (with the result that non-listed uses were *in fact unlawful* for farmers to engage in). The premise of the multi-million-dollar award is thus in direct conflict with requirements

imposed by federal law and in derogation of choices expressly authorized by federal law. A more obvious collision between state and federal law is difficult to imagine.

The state/federal conflict is all the more striking because the judgment imposes a $52 million punishment on BASF. As this Court has repeatedly recognized, treble damages are "essentially punitive in nature." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); see also *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."). The New Jersey courts have recognized that treble damages under the NJCFA, N.J. STAT. ANN. §§ 56:8-2, 56:8-19 (West 2002), serve not only to compensate the plaintiff "but also to punish the [defendant] and to deter others." *Furst* v. *Einstein Moomjy, Inc.*, 860 A.2d 435, 441 (N.J. 2004); see also *Cox* v. *Sears Roebuck & Co.*, 647 A.2d 454, 463 (N.J. 1994).

The Minnesota Supreme Court concluded that there was no preemption in this case, because under *Bates* the massive judgment does not reflect any "requirement" imposed by state law on Poast Plus's "labeling." That holding is fundamentally misguided. In Minnesota, there is now a very rigid labeling requirement: the labeling for all FIFRA-registered products must either list *all* of the federally registered uses or else disclose the existence of the federally registered uses that are not authorized by the manufacturer. This requirement certainly is different from federal law. In fact, it is *diametrically opposite* to federal law. The EPA's subset labeling rule allows a pesticide manufacturer to *refrain from* listing some of the federally registered uses, and federal law forbids the promotion or encouragement of off-label uses (which would occur if federally registered uses that are not authorized were included or referenced in the labeling).

The same is true of the product name. Under the decision below, Minnesota now requires that pesticides with similar

ingredients be labeled as the same rather than different products. Anything else can be attacked as deception and "unconscionable" conduct. But federal law forbids that very kind of labeling. Thus, state law is requiring misbranding under federal standards, backed by the threat of huge treble-damage punishments in class action proceedings. Under *Bates*, these requirements imposed under the New Jersey Consumer Fraud Act plainly are "different from, or in addition to" the requirements of federal law and thus are expressly preempted by Section 136v(b) of FIFRA. As petitioner and *amicus* CropLife America demonstrate, the lower court's express preemption holding conflicts with *Bates* and is manifestly incorrect.

Although that is reason enough for this Court to grant the petition, review is warranted for two additional reasons that will be the focus of this brief. First, the lower court's cramped and erroneous reading of *Bates* is deserving of review because of its potential to affect the many other express preemption clauses that target product "labeling." The existence of those other preemption regimes – and the likelihood that *Bates* and the decision below may be followed in those other statutory settings – underscores the broader importance of the issues raised and the need for this Court's review. Moreover, the procedural posture of this case – arising as it does following a jury verdict – makes it an ideal vehicle for clarifying how the lower courts should apply the *Bates* framework in this recurring setting.

Second, the Minnesota Supreme Court's treatment of BASF's arguments for *implied* preemption also deserves this Court's review. This is a compelling case for implied conflict preemption "by direct operation of the Supremacy Clause" (*Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984)), because Minnesota has imposed a massive punishment on BASF for doing precisely what federal law requires and authorizes.

Implied preemption of the state court's judgment exists in this case *whether or not* that judgment imposes "requirements" for pesticide "labeling" that are "different from," or "in addition

to" requirements imposed under FIFRA within the meaning of 7 U.S.C. § 136v(b). Suppose, for example, that federal law required BASF to color Poast Plus red – or to make certain "oral representations" in connection with sales of Poast Plus to distributors or farmers. Even if under *Bates* those obligations are not "requirement[s] for labeling," they would still constitute federal directives that the states would not be free to undermine. Can there be any doubt that the Supremacy Clause would preempt a state law that imposed a $52 million punishment on BASF for using red coloration or for making such a federally compelled oral representation? Of course not. Such a punishment (whether or not it was a "labeling requirement") would directly conflict with federal law and thus be nullified by the Supremacy Clause.

The Minnesota Supreme Court failed to analyze or evaluate BASF's implied preemption arguments under this Court's precedents. The lower court even suggested, at one point, that this Court's analysis in *Bates* – specifically, its rejection of the "effects-based" argument relating to the meaning of Section 136v(b) – also limited the scope of *implied* preemption in this setting. The lower court's apparent misreading of *Bates* (including the separate opinion of Justice Thomas) as establishing that FIFRA's express preemption clause precludes litigants from advancing arguments based on implied conflict preemption is squarely at odds with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-89 (1995) – and provides an additional reason why further review is needed.[3]

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[3] PLAC agrees with BASF and *amicus* Chamber of Commerce of the United States that the First Amendment issue raised in the petition for certiorari also warrants this Court's review. Especially troubling (and perplexing) is the Minnesota courts' imposition of state-law treble-damages liability on a manufacturer for truthfully reporting to responsible government authorities the illegal actions of third parties in connection with the use of the manufacturer's product. To meet space limitations and avoid redundant briefing, however, this brief focuses on the preemption question.

ARGUMENT

I. THE LOWER COURT'S EXPRESS-PREEMPTION HOLDING WARRANTS REVIEW

A. This Case Would Allow The Court To Clarify How The *Bates* Framework Should Be Applied To Verdicts Following A Full Trial

Preemption is an affirmative defense of law that is usually resolved on purely legal grounds at the threshold of or early in litigation (on a motion to dismiss or for summary judgment), as was true in *Bates*. See 544 U.S. at 435, 443 n.15. Thus, the target of the preemption defense ordinarily is the allegations in the plaintiff's complaint. For this reason, this Court has repeatedly stated that a plaintiff may *not* avoid preemption through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) ("[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their contract claims as claims for tortious breach of contract.'") (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985)); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading.").

This case arises in the distinctive procedural setting of a judgment entered based on a jury verdict after a full trial. In rejecting BASF's arguments for express preemption under FIFRA in this setting, the Minnesota Supreme Court relied on a two-step analysis. First, it interpreted this Court's decision in *Bates* as limiting Section 136v(b) to state regulations that are "*very directly related* to labeling and packaging." Pet. App. 13a (emphasis added). Next, and more importantly for present purposes, the lower court suggested that express preemption under FIFRA should turn on whether there is some evidentiary support in the record for the plaintiffs' "characterization" of their claims (as relying on "nonlabel" conduct). See Pet. App. 15a. "Because we conclude that record supports the farmers'

characterization of their claims as based on nonlabel conduct," the court held, "under *Bates* there is no FIFRA preemption." *Id.* at 18a-19a (emphasis added).[4]

Further review is warranted in this case to clarify how the *Bates* framework for express preemption should be applied in the trial setting. The only guidance this Court gave in *Bates* concerning this recurring and important context – the admonition that "[i]f a case proceeds to trial, the court's jury instructions *must* ensure that nominally equivalent labeling requirements are genuinely equivalent" and "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA * * * standards" (544 U.S. at 454 (emphasis altered)) – was disregarded by the Minnesota Supreme Court. Pet. 21-23.

The lower court's approach conflicts in several respects with this Court's decisions. Its heavy emphasis on respondents' "characterization" of their own claims gives rise to the very same risk of circumvention repeatedly condemned by this Court, and is inconsistent with this Court's teaching that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Kalo Brick*, 450 U.S. at 324. Further, the suggestion that express preemption hinges on whether there is evidentiary support in the record for a liability theory that is not preempted departs from this Court's usual approach to appellate review of a general verdict that rests on multiple alternative grounds, one or more of which is legally erroneous (here, because it is preempted). In a line of cases stretching back more than a century, this Court has made clear that a jury verdict must be vacated where it could rest on a number of different legal theories, some of which are legally defective. See *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991). The

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[4] As BASF (Pet. 14-21) and *amicus* CropLife America (CLA *Amicus* Br. 4-11) show, the lower court's interpretation of *Bates* is problematic in several important respects. Review is also warranted to address and correct the these aspects of the lower court's decision.

Minnesota Supreme Court's approach ignores that basic principle and allows FIFRA's express preemption clause to be circumvented in any case where the plaintiff can point to *some* record evidence of "off-label" conduct (which is to say, in virtually every case).[5]

B. The Decision Below Is Important Because It May Affect Other Express Preemption Clauses That Target Labeling Requirements

Although the Minnesota Supreme Court's evisceration of FIFRA's express preemption clause alone justifies review, the effects of the decision below are likely to be felt beyond the context of pesticide labeling. Many other provisions in the United States Code specifically preempt nonidentical state "requirements" that relate to product "labeling." Those include, for example, the Federal Hazardous Substances Act ("FHSA"), which Congress enacted to provide nationally uniform requirements for cautionary labeling of hazardous substances intended for household use. See *Moss* v. *Parks Corp.*, 985 F.2d 736, 739 (4th Cir.), cert. denied, 509 U.S. 906 (1993). The FHSA's express preemption clause declares that "no State * * * may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging * * * unless such cautionary labeling requirement is identical to the [FHSA] labeling requirement." 15 U.S.C. § 1261 note. Prior to *Bates*, some courts had concluded that, because of similarities in the statutory text, FHSA and FIFRA have identical preemptive reach. See, *e.g.*, *Chemical Specialties*

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[5] A pesticide manufacturer that has determined that no warning as to a particular matter is needed or desirable in the product labeling is highly unlikely to provide the omitted, unnecessary warning in television or radio advertisements, through oral representations of its sales agents, or in other communications outside the "labeling or packaging." Thus, a plaintiff whose essential complaint is the manufacturer failed to provide a warning in pesticide labeling is almost always able to point to communications outside the labeling or packaging that also lack the warning in question.

Mfrs. Ass'n, Inc. v. *Allenby*, 958 F.2d 941, 945 (9th Cir.), cert. denied, 506 U.S. 825 (1992).

When Congress enacted the current version of the FHSA preemption clause in 1976, it did so with the avowed purpose of creating "a uniform Federal preemption clause" for the FHSA and for three other federal statutes that include preemptive commands similar to FHSA's: the Consumer Product Safety Act (15 U.S.C. § 2075(a) (preempting, among other things, nonidentical state standards relating to the "packaging" or "labeling" of consumer products)); the Poison Prevention Packaging Act (*id.* § 1476(a) (same for state requirements relating to "special packaging" of certain household products)); and the Flammable Fabrics Act (*id.* § 1203(a)). See S. Rep. No. 94-251, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 993, 996; H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27-28, *reprinted in* 1977 U.S.C.C.A.N. 1017, 1030. Accordingly, these provisions have been treated as coextensive with FHSA's preemption clause.

In addition, at least 10 other federal statutes expressly preempt state "requirements" relating to product "labeling." Those include: (1) the Child Safety Protection Act, 15 U.S.C. § 1278 note (preempting state "requirement[s] relating to cautionary labeling" for toys, games, balloons, marbles and other products that present choking hazards to children); (2) the Fair Packaging and Labeling Act, *id.* § 1461 (preempting state laws governing "labeling" of certain consumer products); (3) the Magnuson-Moss Warranty Act, *id.* § 2311(c) (preempting certain state "requirement[s]" that relate to warranties in "labeling"); (4) the National Education and Labeling Act, 21 U.S.C. § 343-1(a) (preempting certain state "requirements" relating to food "labeling"); (5) the Poultry Products Inspection Act, *id.* § 467e (preempting certain state "requirements" relating to poultry "labeling"); (6) the Federal Meat Inspection Act, *id.* § 678 (preempting certain state "requirements" relating to meat "labeling"); (7) the Egg Product Inspection Act, *id.* § 1052 (preempting certain state "requirements" relating to egg product "labeling"); and (8) the Mercury-Containing and Rechargeable

Battery Act, 42 U.S.C. § 14322(e) (preempting certain state "labeling requirement[s]" for rechargeable batteries and rechargeable consumer products).[6]

Because of their apparent similarities with Section 136v(b) of FIFRA (at least when viewed in isolation), these preemption provisions potentially give rise to the same issues that are presented in this case. Not surprisingly, there is already substantial litigation in the lower courts over whether and how *Bates* applies to the foregoing statutes. Compare, *e.g.*, *Mills, M.D.* v. *Giant of Maryland, LLC*, 2006 WL 2165756, at *2-*4 (D.D.C. Aug. 2, 2006) (failure-to-warn claims relating to milk are preempted by the National Education and Labeling Act, 21 U.S.C. § 343-1(a); FIFRA is distinguishable and *Bates* does not require rejection of the preemption defense) *with Vermont Pure Holdings, Ltd.* v. *Nestle Waters North America, Inc.*, 2006 WL 839486, at *3-*7 (D. Mass. Mar. 28, 2006) (relying on *Bates* and overruling magistrate's recommendation in case involving preemption under 21 U.S.C. § 343-1(a)).

Undoubtedly, the Minnesota Supreme Court's cramped interpretation of FIFRA preemption and of this Court's decision in *Bates* is likely to be the subject of litigation in a variety of other preemption settings. For that reason as well, the decision below is important and warrants further review.[7]

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[6] See also 42 U.S.C. § 6297(a) (preempting certain state "labeling requirements" relating to energy consumption or water use with respect to certain products); *id.* § 6363(e)(1) (preempting certain state labeling requirements concerning containers of recycled oil).

[7] The nature of the state-law claims involved here also make this case an ideal vehicle for clarifying *Bates*. Respondents are a nationwide class of farmers who brought suit under a single state's consumer fraud statute, the NJCFA, which broadly forbids any "unconscionable commercial practice" (N.J. STAT. ANN. § 56:8-2 (West 2002)) – and is among the most far-reaching consumer fraud statutes in the country. See *International Union of Operating Engineers Local No. 68 Welfare Fund* v. *Merck & Co.*, 894 A.2d 1136, 1143 (N.J. Super. A.D.), appeal granted, 902 A.2d 1232 (N.J. 2006). Class actions of this kind (based on the

II. THE LOWER COURT'S FLAWED TREATMENT OF BASF'S IMPLIED-PREEMPTION ARGUMENTS ALSO WARRANTS REVIEW

Congress's preemptive intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). State and local laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Even if state law falls outside of the reach an express preemption clause, it may nevertheless be preempted if it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also note 2, *supra*.

Although BASF argued below that respondents' claims were barred by both express and implied preemption, the Minnesota Supreme Court never mentioned implied conflict preemption. To the extent the lower court addressed BASF's underlying reasons for why state and federal requirements were in direct conflict, it suggested that the BASF's argument failed under *Bates*'s test for express preemption. See pages 4-5, *supra*. Specifically, the Minnesota Supreme Court treated this Court's rejection in *Bates* of the "inducement" test as imposing similar limits on the scope of implied conflict preemption under the Supremacy Clause – even though that rejection was expressly based on specific features of the text of 7 U.S.C. § 136v(b). The lower court's handling of implied conflict preemption was seriously flawed and provides an independent reason why this Court's review is needed.

NJCFA and other broad state consumer fraud provisions) have become increasingly common in recent years in the state courts. Review would clarify how such broad claims of "unconscionable conduct" should be analyzed under the *Bates* framework.

A. *Bates* Does Not Preclude Arguments Based On Implied Conflict Preemption Or Articulate Limits On The Supremacy Clause

In *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), this Court rejected as "without merit" the contention that the presence of an express preemption provision "entirely forecloses any possibility of implied pre-emption." 514 U.S. at 287-88. In so doing, the Court clarified a pervasive misunderstanding that had developed in the lower courts concerning a passage in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), that purported to invoke "a variant of the familiar principle of *expressio unius et exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Compare *id.* at 547 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (criticizing the analogy to the *expressio unius* principle in this setting, at least as applied to implied conflict as opposed to implied field preemption).

The Minnesota Supreme Court fell into the same error in this case. The idea that when Congress includes an express preemption provision in a statute, it thereby declares open season on everything else in the Act – and allows states to pass laws that directly conflict with federal law – is woefully mistaken. It is wrong as a matter of constitutional law because Congress lacks the power to modify the commands of the Supremacy Clause. Likewise, it makes little sense as a guideline for Congress's likely intent. A far more sensible assumption is that Congress is presumptively aware of the backdrop of existing law – including the ordinary rules of implied preemption that are applied to *all* statutes – when it legislates. See *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992). Thus, Congress enacts an express preemption clause when it wishes to *go beyond* the usual principles of implied preemption that operate as a default. Perhaps for that reason, the Court before *Cipollone* had repeatedly considered implied preemption arguments notwithstanding the applicability

of express preemption clauses.[8] And it has continued to do so since *Cipollone* and *Myrick*. See, *e.g.*, *Boggs* v. *Boggs*, 520 U.S. 833, 844 (1997) (deciding case on basis of implied conflict preemption under ERISA even though that statute has an express preemption clause); *Buckman Company* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (holding that "fraud on the agency" claims are impliedly preempted by the Medical Device Amendments, which contain an express preemption clause). See also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (holding that even the inclusion of a "savings" clause in a preemption scheme "does not bar the ordinary working of conflict pre-emption principles").

The Minnesota Supreme Court may well have mistakenly accepted the *expressio unius* principle based on a misreading of *Bates*, which makes only a passing reference to implied preemption (taking note of the rejection of field preemption in *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991)), and otherwise limits its analysis to express preemption under 7 U.S.C. § 136v(a). Moreover, Justice Thomas's separate opinion commended the majority for "rightly declin[ing] to address [Dow]'s argument that petitioners' claims are subject to other types of pre-emption," explaining that this action "comports with this Court's increasing reluctance to *expand* federal statutes beyond their terms through doctrines of implied pre-emption." 544 U.S. at 458-59 (Thomas, J., joined by Scalia, J.) (emphasis added). That statement might have been misunderstood by the lower court as endorsing the *expressio unius* principle rejected in *Myrick*. Yet Justice Thomas's opinion goes on to suggest that it is appropriate for courts to

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[8] See, *e.g.*, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 611-12 (1991) (applying implied preemption analysis to FIFRA notwithstanding conclusion that municipal ordinance at issue not expressly preempted); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-43 (1990); *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 509-22 (1989); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 540-43 (1977).

engage in an "inquiry into whether the ordinary meanings of state and federal law conflict" (*id.* at 459) – and there was no argument by the manufacturer in *Bates* (unlike here) that state law was directly contrary to federal mandates and federally granted options (only arguments for implied field and implied obstacle preemption). See No. 03-388 Resp. Br. 36-37.

Courts and commentators have disagreed about the significance of this Court's treatment of implied conflict preemption in *Bates* – and its broader significance, if any, for preemption law. Compare, *e.g.*, Jean Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 749 (2006) (stating that "it may seem strange" that *Bates* "did not directly address why conflict preemption principles did not fit into its analysis" and surmising that Court "drew a functional line between situations in which implied preemption may operate and those in which it clearly would not") *with Wuebker* v. *Wilbur-Ellis Co.*, 418 F.3d 883, 887-88 (8th Cir. 2005) (in post-*Bates* case involving FIFRA, examining arguments for implied preemption). Further review is warranted to clarify this aspect of *Bates* and explain that the limits expressed in Section 136v(b) do not place any restriction on the Supremacy Clause or the doctrine of implied conflict preemption.

B. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Exercising A Choice Granted By Federal Law

Once it is recognized that *Bates* does not bar arguments based on implied conflict preemption, it is clear that respondents' claims are preempted by the Supremacy Clause. Respondents' theory of liability was that BASF "unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast." Pet. App. 85a. At trial, some of respondents were far more blunt, arguing that it was "unfair, unethical, [and] immoral" for BASF *not to label* Poast Plus for minor crops

when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170 (emphasis added).

This theory of liability is impliedly preempted because it directly conflicts with federal law. BASF's decision to label Poast Plus for only a subset of the crops for which it was EPA-approved was an option explicitly authorized by federal regulations. See 40 C.F.R. § 152.130(b) ("A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use."). As explained by BASF (Pet. 4-5, 6, 19-20), this subset labeling option serves several salutary purposes. First, even if a pesticide has EPA's approval, its manufacturer may believe it has not been tested sufficiently on a particular crop (such as an especially minor crop). Second, in the event a manufacturer has trouble obtaining state registration for a particular crop, subset labeling allows it to release that product for use on other, approved crops. Subset labeling also allows manufacturers greater freedom in marketing their products. See generally CLA *Amicus* Br. 15-17.

In a series of cases, this Court has made clear that a state law is impliedly preempted if it would undermine or prohibit an option granted by Congress or by a pertinent federal agency. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Barnett Bank*, 517 U.S. at 31; *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982). In *de la Cuesta*, this Court held that a federal law authorizing savings and loan associations to use particular "due-on-sale" clauses in loan agreements impliedly preempted a state law prohibiting such federally approved clauses. 458 U.S. at 156. Similarly, in *Barnett Bank*, this Court held that a federal statute guaranteeing that certain banks could "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance" (12 U.S.C. § 92) impliedly preempted the order of a state insurance commissioner, based on a state statute, directing a bank to stop selling insurance. Because the state statute conflicted with the bank's federal authorization to sell insurance, the Court held that it was impliedly preempted.

More recently, in *Geier*, this Court held that a federal regulation granting auto manufacturers the option of "choos[ing] among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies" (529 U.S. at 878) preempted a state tort action imposing liability for exercising that option in a certain way. The Court recognized that any liability predicated on a duty to install airbags would necessarily imply that choices *other than* airbags were inadequate even though they were federally sanctioned, a conclusion that in turn would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. It therefore held that plaintiff's tort claim was impliedly preempted.

This line of cases is dispositive here. Federal regulations allowed BASF to label Poast Plus for use on only a subset of the crops for which EPA approved it. The conclusion that BASF engaged in fraudulent marketing by failing to list all permissible uses of Poast Plus conflicts with this regulation because liability stems directly from the decision to use subset labeling, a decision EPA consciously left to the manufacturer. The result is especially perverse in this case because, as the petition notes (at 5), BASF's decision not to seek state registration for Poast Plus for minor crops was based on the insistence of company scientists that additional testing be conducted prior to marketing the product for those uses in order to ensure safety.

In rejecting BASF's argument, the Minnesota Supreme Court reasoned that liability was imposed on BASF based not on the company's choice to use subset labeling, but rather on its misleading statements regarding Poast Plus's registration. The lower court pointed out that respondents relied on the fact that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops, even though EPA had also approved the cheaper Poast Plus for that use. Pet. App. 16a. But BASF could not have advertised its product for uses as to which federal, but not state registration, had been obtained without running afoul of the federal prohibition against the promotion of off-label uses. See 7 U.S.C. §§ 136j(a)(1)(B),

136j(a)(2)(G). It is clear in any event that BASF could have avoided liability under respondents' theory only by relinquishing its federally conferred right to engage in subset labeling and seeking state registration for all uses in every state. If that were required to avoid liability under state law, however, the federal right to engage in subset labeling would be a nullity.

C. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Obeying The Requirements Of Federal Law

Respondents' claims under the NJCFA were also predicated on the assertion that BASF committed "unconscionable conduct" when it misrepresented that Poast and Poast Plus were different products. But BASF's decision to give Poast and Poast Plus distinct names and labels was *compelled* by federal law. If federal regulations compel an action that state law punishes, the state law must give way. See *United States* v. *Locke*, 529 U.S. 89, 109 (2000) ("conflict pre-emption * * * occurs when compliance with both state and federal law is impossible") (internal quotation marks omitted).

It is undisputed that federal law required BASF to give separate names and labels to the two herbicides. EPA assigned the two products different registration numbers (D Exs. 694, 701), required BASF to submit separate toxicology data for each (see 40 C.F.R. § 158.340), and mandated that the two products be given different names. See 40 C.F.R. § 152.43. To the extent that the jury based its finding of fraud on BASF's decision to label these "identical" products differently, such liability squarely conflicts with federal law and thus is impliedly preempted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Masco Corporation

Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)

Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.